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## THE LAW SCHOOL.

## IN THE MOOT COURT.

Coram GRAY, J.

*Joseph Fraine v. Matilda Fraine.*

A divorce for desertion will not be granted where the libellant has filed, during the continuance of the alleged desertion, another libel for divorce on account of adultery.

The libel for divorce on account of adultery operates as notice to the libellee that a renewal of cohabitation is not desired, so that the libellant becomes thereby a consenting party to the separation.

Cases decided under the English statute distinguished.

**L**IBEL for divorce on the ground of desertion, filed Feb. 19, 1886. The libel was undefended. At the hearing it appeared that the parties were married in 1879; that on Jan. 10, 1882, the libellee deserted the libellant, and had continued away from him to the time of filing the libel; that in March, 1885, the libellant discovered evidence tending to show adultery on the part of the libellee; that in May, 1885, he filed a libel against her on the ground of adultery, to which she filed an answer, which libel is still pending.

The libellant testified as a witness. He was asked by the judge whether he would have taken the libellee back at any time before the filing of the libel. He said he would have taken her back at any time before he discovered the evidence tending to show her adultery, but that he would not have taken her back after that time. There was no evidence that he had ever said this to the wife.

The judge reserved the case for the determination of this court.

A statute provides that a divorce from the bond of matrimony may be decreed, among other causes, for adultery, and for "desertion continued for three consecutive years next prior to the filing of the libel."

The Attorney-General appears under a statute providing that he intervene to oppose the granting of any libel undefended by the libellee.

*H. M. Williams* and *J. V. Bonnett* for the Libellant.

*S. Williston* and *E. G. Brooks* for the Attorney-General.

GRAY, J. Whether a secret determination by a husband, whose wife has left him, not to take her back, would, if proved, defeat a libel against her for desertion, or whether a like determination expressed to a third person would have that effect, it is unnecessary in this case to consider; for the filing and service of the libel for adultery was a declaration to the libellee of the most solemn kind that her husband would not take her back. If not absolutely incompatible with a willingness to receive her, it must be deemed so in the absence of countervailing evidence, of which there is none here. Nor does the libellant much dispute this position.

But he contends that if a wife who has deserted her husband has a fixed intention not to return, whatever her husband's wishes, the desertion continues, although the husband has declared that he will not take her back; and for this the libellant relies on *Hewes v. Hewes*, 7 Gray, 279, where, on an undefended libel, it was held that a man had deserted

his wife for five years consecutively, although for the greater part of the five years he had been in prison. This case, if it be good law, shows that a deserted wife is not to be deprived of the right which she would have to a divorce, simply because her husband, by his own misconduct, has rendered impossible that return, which, if possible, he would never have attempted. But it is of the essence of her right that she is injured by the continued absence of her husband, and if she consents to this continued absence, she is not injured, and has no right to a divorce.

The libellant, however, further insists that, although it be true, as a general proposition, that the consent of a libellant to a continued desertion is fatal to the libel, yet there is an exception; and he argues that if the consent to the desertion is for a justifiable cause, as in this case, the libel can be maintained. To establish this exception he relies on several English cases, *Graves v. Graves*, 3 Sw. & T. 350; *Gibson v. Gibson*, 29 L. J. M. 25; *Gatehouse v. Gatehouse* 36 L. J. M. 121; some of which, at any rate, support his contention.

But this exception rests on the special terms of the English statute. Desertion was never a cause of divorce in England, until the statute establishing the Divorce Court, 20 and 21 Vict., c. 8 (1857). There it appears for the first time. By that statute a woman cannot have a divorce for adultery alone, as for desertion alone; but for "adultery coupled with desertion, without reasonable excuse, for two years or upwards," § 27.

Under this provision, if a man deserts his wife for two years, and also commits adultery, but his wife does not discover the adultery until after the expiration of the two years, and has, therefore, during the two years been always desirous for his return, she is clearly entitled to a divorce; but suppose that before the two years have elapsed she discovers that her husband is living in adultery, now, under these circumstances, the law must be either: *First*, That she is bound to take her husband back; or, *Second*, That she is not entitled to a divorce; or, *Third*, That she is entitled to a divorce, although she is not willing to take her husband back.

The English statute cannot have intended to declare either of the first two of these propositions. It cannot mean that she is bound to take back her husband; it cannot mean that she is entitled to a divorce from a secret adultery, but not from an open one. The third proposition must, therefore, express the intention of the statute, and the word "desertion," as used therein, cannot have its ordinary meaning of going and staying away without consent, but must include a going and staying away with justifiable consent.

This novel and exceptional meaning of the word desertion is the result simply of the dilemma brought about by the English statute coupling adultery and desertion as a cause for divorce; but under the statute in this case, where either offence is alone a sufficient cause for divorce, the dilemma does not arise, and there is, therefore, no occasion to give an artificial meaning to the term desertion, or to use it in any other than its natural sense. This result is in accordance with the American authorities. *Porritt v. Porritt*, 18 Mich. 420; *Salorgne v. Salorgne*, 6 Mo. Ap. 602.

If the libellant wants a divorce from his wife he must prosecute the libel for adultery.

*Libel for desertion dismissed.*